

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODERICK ROBERT STRELAU,

Defendant-Appellant.

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UNPUBLISHED

October 7, 2003

No. 239792

Oakland Circuit Court

LC No. 00-171363-FH

Before: Bandstra, P.J., and White and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of assault of a prison employee, MCL 750.197c, for which he was sentenced, as a third habitual offender, MCL 769.11, to serve 4½ to 8 years in prison. We affirm.

Defendant first argues that he is entitled to a new trial because the prosecutor failed to provide him with reasonable investigatory assistance in identifying, locating and producing witnesses, as required by MCL 767.40a(5). We agree that the prosecutor breached its statutory duty to assist defendant in identifying and locating witnesses, but do not conclude that the prosecutor's failure to comply with the statute warrants relief under the circumstances of this case.

More than a year before his trial defendant began requesting that the prosecutor provide him with the names of inmates who were housed in certain cells at the Oakland County Jail on February 8, 2000, and thus may have witnessed the events preceding the incident at issue in this case. Defendant also requested investigatory assistance to locate those witnesses. The requested information was not, however, provided to defendant until several days before trial was scheduled to begin.

A prosecutor's duty to produce *res gestae* witnesses has been replaced with the obligation to provide "reasonable assistance" to the defendant in locating those witnesses, should the defendant request such assistance. MCL 767.40a(5); see also *People v Burwick*, 450 Mich 281, 288-289; 537 NW2d 813 (1995). Here, by failing to provide defendant with the requested information in a timely manner, the prosecutor failed in its duty to provide the "reasonable assistance" contemplated by the statute. However, notwithstanding this failure we do not conclude that a new trial is required. With the aid of the prosecutor, defendant was ultimately able to locate and call Shelby Jones, a former inmate of the jail who was present on February 8,

2000. Consistent with defendant's claim that he acted in self-defense after the deputy challenged him to a "one-on-one," Jones testified that the deputy defendant was alleged to have assaulted made a "physical gesture" toward defendant immediately before the altercation between the two. Given Jones' testimony in this regard, as well as that of defendant, defendant was not deprived of the ability to present his defense, and any additional testimony by the missing witnesses would likely have been cumulative.

Moreover, the trial court cured any prejudice to defendant by instructing the jury that the prosecutor was late in forwarding the names of potential witnesses to defendant, and that the jury could, therefore, assume that if the witnesses had been called their testimony would have been unfavorable to the prosecution's case. See *People v Rode*, 196 Mich App 58, 67-68; 492 NW2d 483 (1992) (trial court must exercise discretion in fashioning a remedy for noncompliance with the provisions of MCL 767.40a), rev'd on other grounds *People v Hana*, 447 Mich 325; 524 NW2d 682 (1994). Such instruction has been found to cure any defect where a witness required to have been produced by the prosecution was not so produced. See *People v DeMeyers*, 183 Mich App 286, 293-294; 454 NW2d 202 (1990). Consequently, a new trial is not required. MCR 2.613(A).

Defendant next asserts three claims of prosecutorial misconduct. Defendant first claims that the prosecutor's failure to timely provide the discovery discussed above deprived him of a fair trial. See *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001) (the test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial). As discussed above, however, given Jones' testimony and the "missing witness" instruction given by the court, it is doubtful that any testimony by a missing witness would have altered the outcome of the proceeding. Accordingly, we do not conclude that defendant was denied a fair trial as a result of the prosecutor's failure to timely provide the requested discovery.

Defendant's second claim of prosecutorial misconduct concerns the prosecutor's questioning of a deputy regarding Jones' housing arrangements while lodged at the Oakland County Jail. The prosecutor elicited testimony that Jones was at times housed in the behavior modification because he was homicidal and/or suicidal. The trial court appears to have permitted the questioning in the belief that it was directed to challenging Jones' opportunity to observe what he claimed to have observed. When it became clear that the prosecutor was proceeding in a different direction, the court directed the prosecutor to curtail the line of questioning. We do not believe that the limited testimony affected the outcome of the trial.

We are similarly not persuaded that defendant's final claim of prosecutorial misconduct warrants relief. Defendant asserts that the prosecutor's questioning of defendant regarding a possible insanity defense in this case constituted prosecutorial misconduct. Defendant did not object below and the issue is, therefore, unpreserved. We review unpreserved issues for plain error affecting the defendant's substantial rights, i.e., error that is outcome determinative. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

The prosecutor's questioning of defendant was not error but an appropriate response to defendant's testimony that he returned to the jail on February 8, 2000, from a forensic examination. Also, defendant testified that he was not, and had never intended to, claim insanity in relation to this case, and the trial court instructed the jury that the prosecutor's questions are

not evidence and should not be considered by it in reaching its verdict. Accordingly, defendant has failed to show any outcome-determinative error. *Id.*; *Abraham, supra*.

We affirm.

/s/ Richard A. Bandstra

/s/ Helene N. White

/s/ Pat M. Donofrio